STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

PROGRESS MICHIGAN,

Plaintiff-Appellant,

v

ATTORNEY GENERAL,

Defendant-Appellee.
_____/

Supreme Court No. 158150-1

Court of Appeals Nos. 340921, 340956

Court of Claims No. 17-000093-MZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

BRIEF ON APPEAL OF APPELLEE ATTORNEY GENERAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Defendant-Appellee Attorney General concurs in Plaintiff-Appellant Progress Michigan's statement of the basis for this Court's jurisdiction. See MCR 7.303(B)(1); MCL 600.215(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The State, as sovereign, is immune from suit unless it consents. Through its enactment of the Court of Claims Act, the Legislature premised the State's waiver of sovereign immunity from suit on a claimant satisfying certain conditions. Does the State have a sovereign immunity defense to the alleged failure to disclose records under the FOIA?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Court of Claims' answer: Did not answer.

   Court of Appeals' answer: Yes.

2. Courts presume that the Legislature acts with full knowledge of existing statutes. In 2014, the Legislature amended the FOIA and mandated that all FOIA actions against the State be brought in the Court of Claims. In doing so, did the Legislature waive the State's sovereign immunity from suit for the alleged failure to disclose records by enacting the FOIA?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Court of Claims' answer: Did not answer.

   Court of Appeals' answer: No.

3. The Court of Claims has jurisdiction to hear, among other things, any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto. And MCL 600.6431(1) makes no distinction between type of claims that are subject to its notice and verification requirements. Is MCL 600.6431(1) applicable to FOIA actions filed in the Court of Claims?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Court of Claims' answer: Yes.

   Court of Appeals' answer: Yes.

4. In enacting the Court of Claims Act, the Legislature mandated that "no claim may be maintained against the State" unless a claimant satisfies MCL 600.6431(1)'s requirements. A court that does not dismiss a deficient claim at its outset allows that claim to be maintained in contravention of MCL 600.6431(1). Did the Court of Appeals correctly hold that Progress Michigan's failure to follow MCL 600.6431 rendered its initial complaint invalid from its inception and incapable of amendment?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Court of Claims' answer: No.

   Court of Appeals' answer: Yes.

5. Under the Michigan court rules, MCR 2.118(D) establishes that an amended complaint relates back to the original pleading only when the amended complaint adds a claim or defense that arises out of the conduct, transaction, or occurrence set forth in the original pleading. Progress Michigan's amended complaint did not add a claim or defense. Did the Court of Appeals correctly hold that Progress Michigan's verified amended complaint could not relate back to the date of its original complaint?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Court of Claims' answer: No.

   Court of Appeals' answer: Yes.

STATUTES AND RULE INVOLVED

MCL 600.6419(1)(a):

(1) Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. All actions initiated in the court of claims shall be filed in the court of appeals. The state administrative board is vested with discretionary authority upon the advice of the attorney general to hear, consider, determine, and allow any claim against the state in an amount less than $1,000.00. Any claim so allowed by the state administrative board shall be paid in the same manner as judgments are paid under section 6458 upon certification of the allowed claim by the secretary of the state administrative board to the clerk of the court of claims. Except as otherwise provided in this section, the court has the following power and jurisdiction:

(a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

MCL 600.6431:

(1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

. . .

(3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

MCL 15.240(1):

(1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

MCR 2.118(D)

An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of the original filing of the affidavit.

INTRODUCTION

At issue is whether and under what conditions a claimant may sue the State in the Court of Claims. The answer to this question, premised upon a proper understanding of the State's sovereign immunity, is simple—the State may assert sovereign immunity to all claims brought in the Court of Claims that do not comply with MCL 600.6431(1). Here, Progress Michigan failed to verify its claim in accordance with the statute, thereby mandating dismissal of its claim. But Progress Michigan is not without recourse. Nothing in the Freedom of Information Act ("FOIA") prevents a requester from filing a new FOIA request after a public body's final determination or a court's dismissal of a FOIA lawsuit. Thus, Progress Michigan is free to submit a new request and file a new compliant complaint in the Court of Claims. Notwithstanding this alternative remedy, the Court of Appeals properly dismissed the instant lawsuit for four reasons.

First, the State has a sovereign-immunity-from-suit defense to the alleged failure to disclose records under the FOIA. This is because the State cannot be sued without the Legislature's consent. And even when the Legislature waives the State's sovereign immunity from suit, it "may place whatever conditions it wishes on rights of its own creation." *Bauserman v Unemployment Ins Agency*, ___ Mich ___ (2019) (Docket No. 156389) (McCormack, C.J., concurring); slip op at 2. In enacting the Court of Claims Act, the Legislature waived the State's sovereign immunity from suit to certain claims while also subjecting that waiver to certain conditions—MCL 600.6431(1)'s notice and verification requirements. Thus, the plain language of the Court of Claims Act mandates dismissal of deficient claims.

Second, the Legislature's enactment of the FOIA did not waive the State's limited sovereign-immunity-from-suit defense. To the contrary, in 2014, the Legislature amended the FOIA and subjected FOIA lawsuits to the jurisdiction of the Court of Claims. Notably absent from the Legislature's amendment was any indication that FOIA lawsuits were exempted from MCL 600.6431(1)'s reach.

Third, the plain language of the Court of Claims Act also does not exclude FOIA lawsuits from MCL 600.6431(1)'s reach. Indeed, MCL 600.6431(1) makes no distinction between the types of claims that are subject to its verification requirement. It broadly mandates that "[n]o claim may be maintained against the state unless" the claimant complies with its requirements. Based on this unambiguous language, MCL 600.6431(1)'s requirements, which Progress Michigan failed to meet, apply to FOIA claims brought in the Court of Claims.

Fourth, Progress Michigan's verified amended complaint, which was filed outside of the FOIA's statute of limitations, does not relate back to the date of its original deficient complaint. In fact, although Progress Michigan attempts to use the relation-back doctrine to save its lawsuit, the plain language of MCR 2.118(D) precludes such a saving construction by limiting its application to "amendment[s] that add[ ] a claim or defense." MCR 2.118(D). Because Progress Michigan merely added the required verification—not a claim or defense—by way of its amended complaint, relation-back does not apply, and its claim is time-barred.

For these reasons, this Court should affirm the Court of Appeals' opinion dismissing Progress Michigan's lawsuit.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Progress Michigan's FOIA request

On September 27, 2016, Progress Michigan sent a FOIA request to the Department of Attorney General ("Department"). (App, p 31a.) It sought emails from 21 current and former Department employees that were "sent or received using a personal email account in the performance of any official function since November 1, 2010." (*Id.*) On October 19, 2016, the Department issued its final determination, which denied the request because, except for one email protected by the work-product privilege,[1] it did not possess records responsive to the request. (*Id.*, p 34a.)

Progress Michigan appealed the Department's denial under MCL 15.240(1)(a). (*Id.*, p 37a.) It alleged that the Department should reverse its determination because the personal emails sought were public records within the scope of the FOIA. (*Id.*) But the Department never disputed that the FOIA encompasses communications transmitted via personal email accounts used in the performance of official duties. (*Id.*, p 34a–35a.) Rather, in upholding its denial, the Department explained that the FOIA request was denied because the records sought did not "exist within personal email accounts of the Department employees and former employees listed" in the FOIA request. (*Id.*, p 40a.)

[1] This email chain was properly exempted from disclosure under MCL 15.243(1)(g), which provides that "[a] public body may exempt from disclosure as a public record . . . [i]nformation or records subject to the attorney-client privilege." Progress Michigan has not disputed that this record was properly exempted from disclosure.

Proceedings Below

On April 11, 2017, 174 days after the final determination of the FOIA request (which occurred on October 19, 2016), Progress Michigan filed a two-count, unverified complaint against the Attorney General in his official capacity in the Court of Claims. (*Id.*, p 1a) It alleged that the Department violated: (1) the FOIA by refusing to disclose emails sent and received on personal email accounts; and (2) the Management and Budget Act and applicable retention and disposal schedule by destroying or failing to preserve public records. (*Id.*, p 5a, 6a.)

In response, the Department filed a motion for summary disposition on two grounds: (1) Progress Michigan failed to comply with the Court of Claims Act's verification requirements, MCL 600.6431(1); and (2) no private cause of action exists under the Management and Budget Act. In response, Progress Michigan filed an amended complaint on May 26, 2017, 219 days after the final determination of its FOIA request. (*Id.*, p 70a.) It also filed a brief in opposition to the Department's motion for summary disposition.

After receiving Progress Michigan's amended complaint, the Department filed a new motion for summary disposition premised upon three grounds. First, it argued that Progress Michigan could not cure its defective claim with an amendment to its original complaint. Therefore, the complaint was subject to dismissal based on governmental immunity pursuant to MCR 2.116(C)(7).[2] Second, the Department argued that, even if Progress Michigan could cure its failure to

[2] The Department's claim of appeal in Docket No. 340921 arose from this issue.

comply with the Court of Claims Act through an amendment to the complaint, the relation-back doctrine did not apply to the amended complaint because it did not add a claim or defense as required by the Court Rules. Consequently, Count I was time-barred by the FOIA's 180-day limitations period and subject to dismissal under MCR 2.116(C)(7). Finally, the Department reasserted that Count II failed to state a claim upon which relief could be granted because a private cause of action does not exist under the Management and Budget Act, and because declaratory relief was unavailable.

On October 16, 2017, the Court of Claims issued an opinion and order that denied in part and granted in part the Department's motion for summary disposition. (*Id.*, p 77a.) In regard to the Department's first argument, it held that a party may amend a deficient claim under the Court of Claims Act with an amendment to its complaint. (*Id.*, p 80a) It reasoned that a party does not have "only one opportunity within the relevant time period in which to comply with the statute's notice and verification requirements." (*Id.*) The Court of Claims also rejected the Department's second argument based on the relation-back doctrine. (*Id.*, p 84a.) In doing so, it relied on the Revised Judicature Act's tolling provision, MCL 600.5856(a). (*Id.*, p 83a.) Significantly, the Court of Claims did not address MCR 2.118(D)'s mandate that an amended pleading relates back to the date of the original complaint only when it adds a claim or defense.

In regard to Count II, the Court of Claims agreed that Progress Michigan failed to state a claim upon which relief could be granted. (*Id.*, pp 84a–85a.) The

Court of Claims noted that the Management and Budget Act provided no private right of action and that other means of enforcement existed under the statute. (*Id.*, p 85a.) Thus, it dismissed Count II with prejudice.

The Department subsequently filed a claim of appeal in regard to its first argument, see Case No. 340921, and an application for leave to appeal as to its second argument, which the Court of Appeals granted and consolidated with Case No. 340921 on December 20, 2017. See Case No. 340956.

On June 19, 2018, in a published per curiam decision, the Court of Appeals reversed the Court of Claims' partial denial of the Department's motion for summary disposition. (Appellant's App, p 87a.) In doing so, it held in relevant part that (1) claimants must comply with MCL 600.6431(1)'s pre-conditions to filing suit against the State and, thus, cannot remedy their deficient claims with an amended complaint, and (2) the relation-back doctrine was inapplicable because Progress Michigan's complaint was invalid from its inception and, therefore, there was nothing pending that could be amended. (*Id.*, 91a–93a.)

Progress Michigan subsequently filed its application for leave to appeal with this Court, which this Court granted on March 20, 2019.

STANDARD OF REVIEW

This Court reviews a denial of a motion for summary disposition de novo. *Maiden v Rozwood,* 461 Mich 109, 118 (1999). The interpretation and application of a statute also presents a question of law that this Court reviews de novo. *Whitman v City of Burton*, 493 Mich 303, 311 (2013).

ARGUMENT

I. The State has a sovereign immunity defense to the alleged failure to disclose records under the FOIA when a claimant fails to comply with the conditions set forth in MCL 600.6431.

Progress Michigan asserts that there is no sovereign or governmental immunity defense to the alleged failure to disclose public records pursuant to the FOIA. It is partially correct. Specifically, properly understood, it is true that the State does not have a governmental immunity defense to the FOIA. And it is also true that the State does not have a sovereign immunity defense to the FOIA—*so long as* the claimant complies with the conditions precedent to the Legislature's waiver of that immunity. Progress Michigan glosses over this qualification and conflates sovereign immunity from *suit* and sovereign immunity from *liability*. For these reasons, this Court should not adopt Progress Michigan's position.

A. The State does not have a governmental immunity defense to the FOIA according to the proper distinction between sovereign and governmental immunity.

It is well-understood that sovereign immunity bars suit only in the absence of consent. *Pohutski v City of Allen Park*, 465 Mich 675, 681 (2002), citing *Manion v State Hwy Comm'r*, 303 Mich 1, 19 (1942). But what is not well-understood is the difference between sovereign immunity and governmental immunity. While the terms "have been over the years used interchangeably in decisions," *id.* at 682, "they have distinct origins and histories," *Ross v Consumers Power Co*, 420 Mich 567, 596 (1984), superseded by statute as stated in *In re Bradley Estate*, 494 Mich 367 (2013); see also *Ballard v Ypsilanti Twp*, 457 Mich 564, 567–568 (1998) ("The term

'governmental immunity' derives from 'sovereign immunity,' and although the two are often used interchangeably, they are not synonymous."). Sovereign immunity is a "term limited in its application to the State and to the departments, commission, boards, institutions, and instrumentalities of the State." *Pohutski*, 465 Mich at 682, quoting *Myers v Genesee Auditor*, 375 Mich 1, 6 (1965). Governmental immunity is sovereign immunity "made applicable to the 'inferior ' divisions of government, *i.e.*, townships, school districts, villages, cities, and counties."[3] *Id.*

Throughout this litigation, the Department has never contended that it is subject to governmental immunity. To the contrary, because an arm of the State has been sued—a public body—only sovereign immunity is implicated. Accordingly, for purposes of this case and those involving "the State and . . . [its] departments, commission, boards, institutions, and instrumentalities," a governmental immunity defense to the alleged failure to disclose public records pursuant to the FOIA does not exist.[4] *Id.* But, for the reasons discussed below, there is a sovereign immunity defense to the alleged failure to disclose public records pursuant to the FOIA.

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[3] Consistent with the concept of governmental immunity used as a term of art to also include sovereign immunity, see *Pohutski* 465 Mich at 682, the court rules provide for an immediate appeal for an order denying "governmental immunity" to a "governmental party," which includes the State, its agencies, and employees. See MCR 7.202(6)(a)(v).

[4] But the FOIA applies to both the State *and* "[a]county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof." MCL 15.232(d)(iii). Thus, while governmental immunity is implicated in FOIA actions against the latter entities, it has been waived through the Legislature's consent to such suits in the circuit court. MCL 15.240(10)(b).

B. While the State may assert a sovereign-immunity-from-suit defense in limited circumstances, it has waived its sovereign-immunity-from-liability defense to the FOIA.

Sovereign immunity is an often-misunderstood concept. And while this misunderstanding is due in part to the conflation of sovereign immunity and governmental immunity, it is also due to the conflation of sovereign immunity from *suit* and sovereign immunity from *liability*. See *Pohutski*, 465 Mich at 681, citing *Manion*, 303 Mich at 19 ("There is a distinction between sovereign immunity from suit and sovereign immunity from liability."); see also *Anzaldua v Band*, 457 Mich 530, 550 (1998) ("[T]he state's sovereign immunity from liability and its immunity from suit are not the same."). Understanding these distinct concepts is critical to determining whether and when the State may be sued, and, pivotal to this case, the FOIA's effect on whether and when the State may be sued.

1. The State's sovereign immunity to suit from FOIA actions is limited to the conditions set forth in MCL 600.6431.

As early as 1844, Michigan courts recognized that "while a state may sue, it cannot be sued in its own courts, unless, indeed, it consents to submit itself to their jurisdiction." *Ross*, 420 Mich at 598, quoting *Mich State Bank v Hastings*, 1 Doug 225, 236 (Mich, 1844). The rationale for this concept was grounded in the principle that the State, "as creator of the courts, was not subject to them or their jurisdiction." *Id.*; *Pohutski,* 465 Mich at 681 ("Sovereign immunity exists in Michigan because the state created the courts and so is not subject to them.").

In line with this rationale, for much of its history the State "permitted suit against only a few selected agencies and then only for limited periods." *Greenfield*

Constr Co Inc v Mich Dep't of State Highways, 402 Mich 172, 195 (1978). Thus, for most claims, no forum existed in the courts in which persons might obtain compensation for damages incurred as a result of the State's acts or omissions. See *id.* But in 1939, the Legislature enacted the Court of Claims Act, and in doing so, created a forum in which claimants *may* maintain suit against the State for certain claims. *Anzaldua v Band*, 457 Mich at 552, citing *Ross*, 420 Mich at 600.[5] Accordingly, the Court of Claims Act "stands as this State's controlling legislative expression of waiver of the State's sovereign immunity from action suit against it . . . and of . . . [its] submission to the jurisdiction of a court." *Greenfield Constr*, 402 Mich at 195.

But the Legislature's waiver of suit immunity did not come without conditions. In enacting the Court of Claims Act, the Legislature provided that the claim meet certain defined parameters:

> [N]o claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state . . . , which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths. [MCL 600.6431(1).][6]

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[5] Originally, the Legislature's waiver of the State's immunity from suit was applicable only to contract and tort claims. 1939 PA 135, § 8(1) ("The Court shall have the power and jurisdiction: . . . [t]o hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its . . . arms or agencies."). In 2013, the Legislature expanded this waiver to include statutory and constitutional claims, demands for monetary, equitable, or declaratory relief, and demands for extraordinary writs. 2013 PA 164, § 6419(1)(a).

[6] PA 135 provided similar conditions. 1939 PA 135 ("[S]uit in said court shall be started by filing with the clerk thereof a verified statement of claim in the form of a

In this way, to properly effectuate the Legislature's waiver of the State's immunity from suit, a claimant must satisfy these "conditions precedent."[7] *Bauserman*, ___ Mich at ___; slip op at 7, citing *Fairley v Dep't of Corrections*, 497 Mich 290, 297 (2015). And these conditions "must be strictly interpreted." *Pohutski*, 465 Mich at 681 (noting that "any relinquishment of sovereign immunity must be strictly interpreted") (citations omitted); *Manion*, 303 Mich at 19 (holding that "[t]he 'court of claims' is a legislative . . . court and derives its powers only from the act of the Legislature and subject to the limitations therein imposed"); *Lehman v Nakshian,* 453 US 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied."). In other words, unless and until a claimant satisfies MCL 600.6431's conditions, that claimant's claims are barred by the State's sovereign immunity from suit.

Of course, the Legislature is free to waive the requirement that claimants comply with the Court of Claims' Act conditions precedent by subjecting the State to suit in another court of competent jurisdiction. See *Co Road Ass'n of Mich v Governor*, 287 Mich App 95, 120 (2010) ("Certain other constitutional and statutory provisions also waive the state's sovereign immunity and permit plaintiffs to bring

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petition setting forth with reasonable certainty . . . in a bill of complaint, the nature and extent of the claim, and to each petition when so filed shall be annexed a condensed statement of the items of said claim in the form of a bill of particulars.").

[7] The Legislature also provided that pleadings filed in the Court of Claims "shall be verified," MCL 600.6434(2), and that "[e]very claim against the state, cognizable in the court of claims, shall be forever barred unless the claim is filed . . . within 3 years after the claim first accrues," MCL 600.6452.

specific causes of action against the state."). And the Legislature has done so on several occasions.

Indeed, the Court of Claims Act itself exempts from its reach "actions brought by the taxpayer under the general sales tax act," "proceedings to review findings as provided in the Michigan employment security act," "prerogative and remedial writs consistent with section 13 of article VI of the state constitution," and "claim[s] for which there is a right to a trial by jury." MCL 600.6419(4), (6); MCL 600.6421(1). The Legislature has also enacted other statutes waiving the State's immunity from suit without condition. See e.g., MCL 15.361 *et seq* (Whistle-Blower's Protection Act); MCL 37.1101 *et seq*. (Persons with Disabilities Civil Rights Act).

Here, the Legislature subjected FOIA actions against the State to the Court of Claims Act as opposed to the circuit court.[8] See MCL 15.240(1)(b) ("If a public body makes a final determination to deny all or a portion of a request, the requesting person may . . . "[c]ommence a civil action in the circuit, or *if the decision of state public body is at issue, the court of claims* . . . .") (emphasis added). Accordingly, the Legislature has waived the State's immunity from suit to FOIA actions so long as claimants comply with the conditions set forth in MCL 600.6431.

[8] This was not originally the case. To the contrary, when FOIA was enacted, the Legislature directed FOIA claims to be filed in the circuit court. See 1976 PA 442, § 10(1). But in 2014, the Legislature directed FOIA claims against the State to the Court of Claims Act, and thus, conditioned the State's waiver of sovereign immunity to suit for FOIA claims on the satisfaction of MCL 600.6431(1)'s requirements.

2. The State does not have a sovereign-immunity-from-*liability* defense to FOIA actions.

Sovereign immunity from *liability* is distinct from sovereign immunity from *suit*. While the State's waiver of sovereign immunity from suit merely "subjects the state to" a court's jurisdiction, *Greenfield Constr*, 402 Mich at 193, sovereign immunity from liability "is an exception to the fundamental concept of tort law that liability follows tortious conduct and that individuals and corporations are responsible for the acts of their employees acting in the course of their employment," *Pittman v City of Taylor*, 398 Mich 41, 50 (1976), citing *Nieting v Blondell*, 306 Minn 122, 128 (1975). Thus, without a waiver of the State's sovereign immunity from liability, damages cannot be assessed against the State for acts committed by it and its subparts.

Although sovereign immunity from liability derived from the common-law, "[i]n 1964, the Legislature codified common-law sovereign immunity to liability and put all then-existing exceptions in one place by enacting the governmental tort liability act [GTLA]." *Ballard*, 457 Mich at 568, citing MCL 691.1401(1) *et seq*. The GTLA provides in relevant part:

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort *liability* in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. [MCL 691.1407(1) (emphasis added).]

As recognized by this Court, "[b]y the '[e]xcept as otherwise provided in this act' language, the GTLA proclaims to contain *all* exceptions to governmental immunity." *Ballard*, 457 Mich at 569, citing *Malcolm v E Detroit*, 437 Mich 132, 139 (1991). But "[w]hile the GTLA does contain several of those exception, others

exist outside the act." *Id.* In determining whether an outside statute waives the State's immunity from liability, courts assess: (1) "whether there is an express statutory enactment subjecting the state to liability," or (2) whether a statute "gives rise to a necessary inference that the Legislature intended to waive the state's immunity to liability." *Id.* at 576.

Here, the parties agree that FOIA actions do not fall within the scope of the GTLA. Instead, FOIA actions are one of the exceptions that exist outside of the act. And it is clear from the plain language of the FOIA that the Legislature intended to subject the State to liability for the failure to disclose records under the FOIA. For example, the Legislature included within the definition of "public body" "[a] state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government." MCL 15.232(d)(i). It also permitted a court to assess damages against the State for failure to disclose records. MCL 15.240(7) ("The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record."). Accordingly, it cannot be argued—and the Department has never maintained—that the State is immune from liability under the FOIA.[9]

[9] Of course, if a claimant does not satisfy MCL 600.6431's conditions precedent, the Legislature's waiver of the State's sovereign immunity from liability means nothing for that claimant.

II. The State's limited sovereign-immunity-from-suit defense has not been waived by the Legislature's enactment of the FOIA.

In enacting the Court of Claims Act, the Legislature gave its consent for the State to be sued in limited circumstances. *Greenfield Constr*, 402 Mich at 195; see also *McDowell v Fuller*, 169 Mich 332, 337 (1912) ("It is a long established and well-recognized principle of sovereignty that a state cannot be sued without its consent, granted by legislative enactment."). Notably, while pre-Court of Claims waivers of suit immunity "must be construed within the terms and in light of the subsequent act," this Court has also held that "'post-Court of Claims Act' legislation waiving suit immunity . . . is [also] limited by the terms and conditions jurisdiction established in the Court of Claims." *Id.* at 196, citing *Hirych v State Fair Comm*, 376 Mich 384, 390 (1965). This makes sense as courts "presume that the Legislature acts 'with a full knowledge of existing statutes.'" *People v Cunningham*, 496 Mich 145, 156–157 (2014), quoting *In re Reynolds' Estate,* 274 Mich 354, 362 (1936).

The FOIA is a "'post-Court of Claims Act' legislation waiving suit immunity." *Greenfield Constr*, 402 Mich at 196. Indeed, the FOIA, enacted in 1976 and effective in 1977, originally provided for jurisdiction in the circuit court:

> If a public body makes a final determination to deny a request or portion thereof, the requesting person may commence an action *in the circuit court* to compel disclosure of the public records. [1976 PA 442 (emphasis added).]

Given that the Legislature directed FOIA actions against the State to be filed in the circuit court, the Legislature, when it originally enacted the FOIA, intended to unconditionally waive the State's sovereign immunity to suit.

But "the doctrine of sovereign immunity as it presently exists in Michigan is a creature of the legislature." *McDowell v Mackie*, 365 Mich 268, 271 (1961). Thus, the doctrine can be "modified by the legislature, abolished by the legislature, re-established by the legislature, and further modified by the legislature." *Id*. In other words, the Legislature's waiver of sovereign immunity from suit "can be revoked at pleasure." *Co Road Ass'n of Mich v Governor*, 287 Mich App 95, 118 (2010), quoting *Sanilac Co v Auditor General,* 68 Mich 659, 665 (1888).

While the Legislature did not revoke the State's sovereign immunity from suit in regard to FOIA claims, it did limit its initial waiver. Specifically, in 2013, the Legislature amended the FOIA in several ways. The most significant amendment for purposes of this case was the Legislature's modification of MCL 15.240. Indeed, while Legislature previously subjected the State to suit for FOIA actions in the circuit court, the amendment to MCL 15.240 provides that the filing must occur in the Court of Claims:

> If a public body makes a final determination to deny all or a portion of a request, the requesting person may . . . [c]ommence a civil action in the circuit court, *or if the decision of a state public body is at issue, the court of claims*, to compel the public body's disclosure of the public records. [2014 PA 563, § 10(1)(b), MCL 15.240(1)(b) (emphasis added.)]

Accordingly, through the 2014 amendment, the Legislature imposed conditions on the State's waiver of sovereign immunity from suit for FOIA claims—satisfaction of MCL 600.6431(1)'s notice and verification requirements. For this reason, the FOIA, as it presently stands, does not waive the State's sovereign immunity from suit.

III. The Court of Claims Act's notice and verification requirements apply to *all* claims filed in the Court of Claims, including FOIA actions.

Progress Michigan asserts that, even if the State has a sovereign immunity defense to the FOIA, the Court of Claims Act's notice and verification requirements do not apply to FOIA appeals. This conclusion is incorrect for two reasons. First, the FOIA authorizes civil actions, not administrative appeals. Second, the plain language of the Court of Claims Act demonstrates that MCL 600.6431(1)'s notice and verification requirements apply to all claims filed in the Court of Claims.

A. The Legislature has authorized a requesting person to commence a FOIA action, not a FOIA appeal.

As a preliminary matter, in enacting the FOIA, the Legislature authorized a requester to file a civil action "to compel the public body's disclosure of the [requested] public records"—not a civil appeal. MCL 15.240(1)(b). This is clear from the plain language of the FOIA and principles of statutory interpretation.

When interpreting a statute, a court must "discern and given effect to the Legislature's intent." *People v Morey*, 461 Mich 325, 330 (1999) (citation omitted). In doing so, a court "begin[s] by examining the plain language of the statute; where that language is unambiguous, . . . [it] presume[s] that this Legislature intended the meaning clearly expressed." *Id.*, citing *Tryc v Mich Veterans' Facility,* 451 Mich 129, 135 (1996). Here, the plain language of MCL 15.240(1)(b) demonstrates that a requester must file a civil action, rather than an appeal, to compel record disclosure. Indeed, MCL 15.240(1)(b) provides that "[i]f a public body makes a final determination to deny all or a portion of a request, the requesting person may . . . [c]ommence a *civil action* in . . . the court of claims." (Emphasis added).

Moreover, it is well-understood that "[w]hen the Legislature uses different words, the words are generally intended to connote different meanings." *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing),* 484 Mich 1, 14 (2009) (citation omitted). Besides the Legislature's use of the term "civil action" in MCL 15.240(1)(b), it also used the words "appeal" and "civil action" within several of the same sub-sections. For example, MCL 15.240(1)(a)–(b) provides that "[i]f a public body makes a final determination to deny all or a portion of a request, the requesting person may . . . (a) [s]ubmit to the head of the public body a *written appeal* . . . [,] [or] (b) [c]ommence a *civil action* in . . . the court of claims." (Emphasis added.) And in MCL 15.240(3), the Legislature specified that a requester could file a written appeal of an initial denial:

> If the head of the public body fails to respond to a *written appeal* pursuant to subsection (2), or if the head of the public body upholds all or a portion of the disclosure denial that is the subject of the *written appeal*, the requesting person may seek judicial review of the nondisclosure by commencing a *civil action* under subsection (1)(b). [Emphasis added.]

See also MCL 15.240(5) ("An action commenced under this section and an appeal from an action commenced under this section shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."). Thus, if the Legislature wanted to create a FOIA appeal it knew how to do so.[10]

[10] Progress Michigan also choose to proceed in this fashion. It titled both its original and amended pleadings as "complaints," and provided that "[t]his is an *action* to vindicate the public's right to information . . . ." (App, p 2a, 71a, emphasis added.)

B. The Legislature intended for MCL 600.6431 to apply regardless of the type of claim brought against the State.

Under the Court of Claims Act, the Court of Claims has exclusive jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers . . . ." MCL 600.6419(1)(a). MCL 600.6431 sets forth "conditions precedent to pursuing a claim against the state." *Fairley v Dep't of Corrections*, 497 Mich 290, 292 (2015). One such condition on the right to sue the State is the requirement in MCL 600.6431(1), which provides in relevant part, that the notice must be signed and verified:

> No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state . . . , which claim or notice shall be *signed and verified by the claimant before an officer authorized to administer oaths*. [Emphasis added.] [11]

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[11] The Court of Appeals recently restricted MCL 600.6431(1)'s requirements to claims brought against the State. *Pike v Northern Mich Univ*, ___ Mich ___ (2019) (Docket No. 344083) (holding that MCL 600.6431(1) does not apply to a claim against a state employee "because it . . . [is] not a claim against the 'state'"); slip op at 7. Under this holding, which the Department maintains is incorrect, Progress Michigan's lawsuit against the Department would not be subject to MCL 600.6431(1)'s requirements. *Id.*; but see *id.* at ___ (Swartzle, J., concurring) ("Prior to amendment in 2013, claims against the state *and its subdivisions* in the Court of Claims were subject to the notice-of-intent requirement, and this remained unchanged after 2013 PA 164.") (Emphasis added); slip op at 2. An application for leave to appeal the Court of Appeals' holding in *Pike* is currently pending before this Court. See Docket No. 159719.

Failure to comply with this provision must result in the dismissal of a claimant's lawsuit. *Fairley v Dep't of Corrections*, 497 Mich at 299.

Progress Michigan does not dispute that it failed to comply with MCL 600.6431(1) in filing its original complaint. Rather, it asserts that MCL 600.6431(1) should not be applied to FOIA actions. But the Legislature clearly intended for MCL 600.6431(1) to apply regardless of the type of claim brought against the State. Indeed, MCL 600.6419(1)(a) makes no distinction among the types of claims within the scope of the Court of Claims' jurisdiction. MCL 600.6419(1)(a) ("[T]he court has the . . . power and jurisdiction . . . [t]o hear and determine *any* claim . . . against the state or any of its departments or officers.") (Emphasis added). Nor does MCL 600.6431(1) make a distinction between the types of claims that are subject to its verification requirement. Instead, it broadly mandates that "[n]o claim may be maintained against the state unless" the claimant complies with its conditions. Based on this unambiguous language, MCL 600.6431(1) applies to FOIA claims brought in the Court of Claims.

Furthermore, Progress Michigan's assertion that the Court of Claims Act's purpose is to "provide procedures for redress of tort injuries and damages"—thus making FOIA claims exempt from its reach—is unpersuasive. (Appellant's Brief, p 18.) One must look only to the original scope of the Court of Claims Act's jurisdiction to find that its initial purpose was to address both contract *and* tort claims. 1939 PA 135, § 8(1) ("The Court shall have the power and jurisdiction: . . . [t]o hear and determine all claims and demands, . . . *ex contractu and ex delicto*,

against the state or any of its . . . arms or agencies.") (Emphasis added). Through the enactment of 2013 PA 164, the Legislature expanded this jurisdiction to include statutory and constitutional claims, demands for monetary, equitable, or declaratory relief, and demands for extraordinary writs. Neither 1939 PA 135 nor 2013 PA 164 limited MCL 600.6431(1) to torts claims.[12]

IV. Progress Michigan's failure to comply with the verification requirement rendered its original complaint invalid from its inception and incapable of amendment.

As a preliminary matter, it is not the Department's position that MCL 600.6431(1) limits claimants to "only one opportunity to satisfy the statute's requirements." (App, p 80a.) To the contrary, a claimant may file as many claims or notices as necessary within the one-year, or six-month, period prescribed by MCL 600.6431. But at issue in the Court of Claims was *how* a claimant may be afforded a subsequent opportunity to meet the statute's requirements. The Court of Appeals rightly concluded that, because strict compliance with MCL 600.6431 is a pre-condition to bringing suit against the State, a non-compliant claim must be dismissed. (*Id.*, p 92a.)

[12] Progress Michigan also incorrectly asserts that a FOIA is "not a claim for damages." (Appellant's Brief, p 19.) To the contrary, a requester who files an action under MCL 15.240(1)(b) may obtain the following relief: (1) "order [requiring] the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld," MCL 15.240(4); (2) "reasonable attorneys' fees, costs, and disbursements," MCL 15.240(6); and (3) "in addition to any actual or *compensatory damages*, punitive damages in the amount of $1,000.00 to the person seeking the right to inspect or receive a copy of a public record," MCL 15.240(7).

As this Court has observed, the State, as sovereign, may be sued only in such instances and under such conditions as it may choose. *Pohutski*, 465 Mich at 681; see also *Bauserman*, ___ Mich at ___ (McCormack, C.J., concurring) ("The State enjoys broad immunity from suit unless it waives its immunity by creating a statutory right of action; the Legislature may place whatever conditions it wishes on rights of its own creation, including a notice requirement."); slip op at 2. And any conditions that the State places on its waiver of "sovereign immunity [from suit] must be strictly interpreted." *Anzaldua*, 457 Mich at 316, quoting *Ross*, 420 Mich at 601. Accordingly, "the judiciary has no authority to restrict or amend those terms."

Through the enactment and amendment of the Court of Claims Act, the Legislature has provided conditions on the State's waiver of sovereign immunity from suit. MCL 600.6431(1); *Fairley*, 497 Mich at 297 (noting that MCL 600.6431 "establishes conditions precedent for avoiding" immunity"). These conditions, a notice, verification, and timeliness requirement, "must be strictly interpreted." *Pohutski*, 465 Mich at 681.

And a strict interpretation of MCL 600.6431(1) leads to the conclusion that the Court of Appeals reached—Progress Michigan's initial "complaint was invalid from its inception, [and thus,] there was nothing pending which could be amended." (App, p 93a.) For example, when interpreting a statute, courts "presume every word is used for a purpose." *Pohutski*, 465 Mich at 683. To that end, while "words and phrases shall be construed and understood according to the common and approved usage of the language[,] . . . technical words and phrases, and as such as

may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such peculiar and appropriate meaning." *In re Estate of Erwin*, 503 Mich 1, 10 (2018), quoting MCL 8.3a. As the Court of Appeals aptly noted, "the word 'maintained' in the Court of Claims Act is used in a technical legal manner to convey a particular legal result," and thus, a court must "construe it according to that 'peculiar and appropriate meaning.'" (App, p 93a). Black's Law Dictionary defines "maintain" as "[t]o continue (something)" or "[t]o assert (a position or opinion)." *Black's Law Dictionary* (10th ed). Applying these definitions to the Court of Claims Act, a court that does not dismiss a deficient claim outright, but instead permits a claimant to cure the deficiency through an amendment, allows that claim to be maintained in contravention of MCL 600.6431(1). To avoid this contravention, a court must dismiss a claimant's deficient claim at its outset.[13]

In enforcing the statute as written, the Court of Appeals correctly held that "in the absence of the claim being verified in plaintiff's initial complaint, the claim could not be asserted and thus lacked legal validity from its inception." (App, p 93a.) Accordingly, this Court should affirm the Court of Appeals' decision.

[13] And, so long as the one-year, or six-month, period prescribed in MCL 600.6431 and the claim's statute of limitation has not elapsed, a claimant may proceed to maintain its claim by filing a new compliant notice in the Court of Claims.

V. Progress Michigan's verified amended complaint, which was filed outside of the FOIA's statute of limitations, does not relate back to the date of its original deficient complaint.

Progress Michigan failed to file a verified complaint within the FOIA's statute of limitations. In an attempt to cure this deficiency, it filed a verified amended complaint on May 26, 2017—39 days after the FOIA's statute of limitations expired. But because Progress Michigan's amended complaint did not add a claim or defense, MCR 2.118(D) dictates that its amended complaint cannot relate back to its original pleading.

A. The relation-back doctrine applies only to added claims and defenses.

Under the Michigan Court Rules, leave to amend pleadings should be freely given when justices requires. MCR 2.118(A)(2). But an amended pleading relates back to the original pleading only when it *adds a claim or defense*. *Miller v Chapman Contracting*, 477 Mich 102, 107 (2007). The court rule expressly explains that point:

> An amendment that *adds a claim or a defense* relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. [MCR 2.118(D) (emphasis added).]

Consequently, an amended complaint that does not add a claim or defense cannot supersede the former pleading. See MCR 2.118(A)(4) ("*Unless otherwise indicated*, an amended pleading supersedes the former pleading.") (Emphasis added).

This is further supported by the fundamental canon of statutory construction *expressio unius est exclusio alterius*. For example, in *Miller*, 477 Mich at 107 n 1,

this Court precluded the application of the relation-back doctrine to the addition of a new party. It reasoned that "it has been long understood that the expression of specific exceptions to the application of a law, as here, implies that there are no other exceptions." *Id.* In other words, because the relation-back doctrine specifically enumerates when an amended pleading may relate back to the original pleading, no additional exceptions may be read into the court rule.

And for good reason. The Legislature, not the court, is responsible for modifying statutes of limitations. *Nielsen v Barnett*, 440 Mich 1, 8–9 (1992) ("By enacting a statute of limitations, the Legislature determines the reasonable period of time given to a plaintiff to pursue a claim."); *McDougall v Schanz*, 461 Mich 15, 27 (1999) ("[T]his Court is not authorized to enact court rules that establish, abrogate, or modify substantive law.").[14] By allowing an amendment that did not add a claim or defense to relate back to Progress Michigan's original deficient pleading, the Court of Claims not only circumvented the statute of limitations applicable to the claim but, more importantly, also implicitly validated the original claim, which was insufficient to satisfy the Legislature's pre-conditions to suit in the first instance. The Court of Appeals identified this error and properly reversed the Court of Claims' determination. (App, p 92a.)

[14] This Court has clarified that statutes of limitations "are substantive in nature." *Gladych v New Family Homes Inc*, 468 Mich 594, 600 (2003).

Significantly, the history of MCR 2.118(D) also supports the limited application of the relation-back doctrine and the Court of Appeals' holding. Prior to 2001, the court rule provided, a broader basis for the doctrine:

> Except to demand a trial by jury under MCR 2.508, an amendment relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. [MCR 2.118(D), amended January 1, 2001.]

The pre-2001 version of the court rule was broad and seemingly applied to both new and already existing claims. But MCR 2.118(D) was amended "effective January 1, 2001, to clarify that the relation-back doctrine pertains to the addition of claims and defenses."[15] MCR 2.118(D), Staff Comment to 2000 Amendment. Thus, the drafters of MCR 2.118(D) have made clear that the relation-back doctrine is intended to apply only to *added* claims or defenses.

The relation-back doctrine's impact on sovereign immunity is of import as well. Courts have delineated only one exception to the requirement that a party must add a claim or defense to an amended pleading for the relation-back doctrine to apply—the misnomer doctrine. *Miller*, 477 Mich at 106 ("As a general rule . . . a misnomer of a plaintiff or defendant is amendable . . . ."). But "[t]he misnomer doctrine applies only to correct inconsequential deficiencies or technicalities in the

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[15] The federal counterpart provides no such limitation. FR Civ P 15(c)(1)(B) ("An amendment to a pleading relates back to the date of the original pleading when: . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Given that "[t]he Michigan Court Rules are, by and large, based on the Federal Rules of Civil Procedure[,]" *North v Dep't of Mental Health*, 427 Mich 659, 670 (1986), this difference is persuasive.

naming of parties." *Id*. Here, the conditions upon which the State has consented to be sued are not inconsequential deficiencies or technicalities—they are pre-conditions to maintaining suit against the State. *McCahan v Brennan,* 492 Mich 730, 736 (2012).

B. Progress Michigan did not file its amended complaint within 180 days of the Department's final determination.

The FOIA sets forth a limitations period that requesters must abide by to challenge a public body's final determination. MCL 15.240 It states in part,

> (1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:
>
> (a) Appeal the denial to the head of the public body . . . .
>
> (b) Commence a civil action in . . . the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request. [MCL 15.240(1) (emphasis added).]

Therefore, an action alleging a violation of the FOIA must be commenced in the Court of Claims within 180 days of the public body's final determination. See *Prins v Michigan State Police*, 291 Mich App 586, 590–591 (2011) (holding that "the 180-day period commences when the public body transmits the denial" of the FOIA request); (App, p 92a, n 1.).

In this case, the Department made its final determination on October 19, 2016, and transmitted the written notice of that decision on the same day. (App, p 73a.) Thus, under MCL 15.240(1)(b), Progress Michigan had until April 17, 2017, to commence a civil action in the Court of Claims. It failed to meet this deadline.

In particular, Progress Michigan filed an unverified complaint on April 11, 2017. Then, in an attempt to cure its deficient claim, it filed an amended complaint on May 26, 2017—219 days after the Department's final determination. The amended complaint is identical to the original complaint in all material respects except that it was signed and verified under oath by the claimant on May 25, 2017.

The Court of Claims disregarded this similarity. In doing so, it overlooked the plain language of MCR 2.118(D), and instead relied on MCL 600.5856(a), which provides in part,

> The statutes of limitations or repose are tolled . . . :
>
> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.

But the Court of Claims failed to take into consideration the significance of the Court of Claims Act's requirements.

As previously discussed, under MCL 600.6431(1), a claim must be signed and verified by the claimant to maintain a claim against the State. In *McCahan*, this Court explained that "when the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, no saving construction . . . is allowed." 492 Mich at 746.[16] Thus, "[c]ourts may not . . . reduce the obligation to comply fully

[16] For this reason, the Court of Claims also erred in applying tolling. Moreover, tolling applies only where there has been a previously dismissed lawsuit against the same defendant and a new lawsuit is initiated. *Terrace Land Dev Corp v Seeligson & Jordan*, 250 Mich App 452, 459 (2002) ("MCL § 600.5856 comes into play where a party files suit beyond the limitation period and seeks to toll the time that elapsed

with statutory notice requirements." *Id.* For this reason, the failure to comply with MCL 600.6431(1) renders a complaint insufficient to "commence a civil action" against the State and must result in its dismissal. See e.g., *Scarsella v Pollak*, 461 Mich 547, 549 (2000) (holding that a complaint without an affidavit of merit was insufficient to "commence" a malpractice lawsuit and, therefore, the application of tolling was improper.) Like *Scarsella*, allowing Progress Michigan to amend its complaint, and applying the equitable doctrine of tolling, results in the judiciary contravening the mandate of the Legislature.

Moreover, the case law relied upon by the Court of Claims is based on the pre-2001 version of MCR 2.118(D). See *Sanders v Perfecting Church*, 303 Mich App 1, 9 (2013); *Doyle v Hutzel Hosp*, 241 Mich App 206 (2000). Prior to 2001, MCR 2.118(D) was broader than the current version in that it did not explicitly limit the relation-back doctrine to amendments that added claims or defenses. See MCR 2.118(D), Staff Comment to 2000 Amendment. Upon amending the court rule in 2001, the drafters included express language "to clarify that the relation-back doctrine pertains to the addition of claims and defenses." *Id.* Thus, the holdings in *Sanders* and *Doyle* are not persuasive, and the Court of Claims' opinion was properly reversed.

Significantly, even though Progress Michigan's amended complaint does not relate back to the original pleading and must be dismissed, Progress Michigan is

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during a previously dismissed lawsuit against the same defendant."). Here, Progress Michigan's lawsuit was never dismissed.

not without recourse. Nothing in the FOIA prevents a requester from filing a new FOIA request after a public body's final determination or a court's dismissal of a FOIA lawsuit. Thus, Progress Michigan is free to submit a new request for the same or different information. In the event that Progress Michigan is still unhappy with the Department's final determination, it may then file a new complaint within 180 days of the Department's final determination. MCL 15.240(1)(b). So long as Progress Michigan complies with MCL 600.6431(1)'s requirements and the statute of limitations provided in the FOIA, it would then be able to maintain a claim against the Department for the alleged failure to disclose records.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, the Department respectfully requests that this Court affirm the Court of Appeals' June 19, 2018 opinion.

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